



**Khamisi & another v Suleiman & 7 others (Environment and Land Case Civil Suit 135 of 2018) [2022] KEELC 15500 (KLR) (22 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15500 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 135 OF 2018**

**MAO ODENY, J**

**DECEMBER 22, 2022**

**BETWEEN**

**MOHAMED SALMIN KHAMISI ..... 1<sup>ST</sup> PLAINTIFF**

**RAMLA SALMIN KHAMISI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**YAHYA MOHAMED SULEIMAN ..... 1<sup>ST</sup> DEFENDANT**

**KANAMAI COCONUT INVESTMENT LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**DISTRICT LAND ADJUDICATION OFFICE ..... 5<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR ..... 6<sup>TH</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KILIFI ..... 7<sup>TH</sup> DEFENDANT**

**DIRECTOR OF SURVEY ..... 8<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is respect of preliminary objection dated December 15, 2021 by the 1<sup>st</sup> defendant and a Notice of Motion dated December 16, 2021 on the following grounds:
  - a. That this suit is *res judicata* for it offends section 7 of the *Civil Procedure Act* laws of Kenya to the extent that this court has no jurisdiction
  - b. The plaintiffs have previously raised the issue of ownership as against the 1<sup>st</sup> defendant in a previous proceedings and the issues having been heard and determined they cannot raise the same issues in a fresh suit in the manner they are now doing.



- c. The plaintiff applied and joined probate suit no 143 of 2014 and obtained orders cancelling the 1<sup>st</sup> defendant's title a fact that they have failed to disclose to the court.
  - d. The issues raised by the plaintiffs in this suit were supposed to have been grounds of attack in the probate case and having failed to raise them they cannot be raised in this suit for reason that they are *res judicata*.
  - e. For reason of *res judicata*, the suit is fatally defective and the same should be dismissed with costs.
2. The 1<sup>st</sup> defendant further filed a Notice of Motion dated December 16, 2021, the seeking the following orders;
- a. Spent
  - b. That this court be pleased to stay this suit pending the hearing and determination of this application.
  - c. That the court be pleased to order the plaintiffs to furnish security for the whole costs amounting to Kenya shillings ten million (kshs 10,000,000)
  - d. That the court to give directions as to time and modalities of giving the said security.
  - e. That costs of this application be provided for.
3. The application is premised on the supporting affidavit of Yahya Mohamed Suleiman the 1<sup>st</sup> defendant who states that prior to filing this suit, the plaintiffs had made an application and joined in a suit where he was a party and their claim was dismissed and they were ordered to pay costs which remain unpaid. That by filing the current suit it is only fair that they be ordered to furnish security for costs.
4. The plaintiffs filed a relying affidavit whereby the deponed that that they are the administrators of the estate of one Salmin Mbiyo by virtue of grant of letters of administration issued by Mombasa Chief Magistrates Court in Succession Cause no 138 of 2016
5. The plaintiffs stated that the 1<sup>st</sup> defendant moved the court whereby their grant was revoked necessitating the filing of Mombasa HCC Misc no 35 of 2018 which reinstated the grant
6. It was the plaintiff's case that their late father was of Tanzanian origin whom during the colonial rule was a tax collector covering the coast of Kenya under the rule of Sultan of Zanzibar. That during that time he married one Binti Aman from Kwale and after independence he continued working with the provincial administration as the Chief Kanamai area until his retirement.
7. The plaintiffs further stated that their father resided on parcel number MN/IV/151 at Kanamai and died intestate on April 26, 2001 at Kanamai and had not donated any power of attorney to anybody. Further, that their father bought the said parcel of land measuring approximately 100 acres from one Mohamed Bin Omar on July 6, 1961 and a title deed was issued to him on September 3, 1963 which title deed is in their possession.
8. It was the plaintiffs' assertion that the title held by the 2<sup>nd</sup> defendant was illegally issued and forged in a bid to dispossess them off the suits property.
9. Counsel for the plaintiffs filed submission on the preliminary objection and the application for security of costs and relied on the elaborate affidavit of the plaintiffs which explains the background of this case.



10. Counsel submitted that when the plaintiffs filed an objection proceedings before the 14<sup>th</sup> defendant to set aside its previous *ex parte* orders, the 14<sup>th</sup> defendant the Kadhi's court ruled on the 1<sup>st</sup> defendant's preliminary objection that it did not have jurisdiction to hear and determine ownership dispute on land which was an automatic admission that the ownership dispute was not resolved hence the suit is not *res judicata*.

### Analysis and determination.

11. The issues for determination is whether this suit is *res judicata*, and whether the plaintiffs should furnish security of costs.
12. The 1<sup>st</sup> defendant raised a preliminary objection on the ground that this suit is *res judicata*. In the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR the court stated:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts.”

13. The doctrine of *res judicata* is set out in section 7 of the *Civil Procedure Act*. This doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. This doctrine applies if the following is proved;
- i. The suit or issue raised was directly and substantially in issue in the former suit
  - ii. The former suit was between the same party or parties under whom they or any of them claim
  - iii. That those parties were litigating under the same title
  - iv. That the issue in question was heard and finally determined in the former suit
  - v. That the court which heard and determined the issue was competent to try both the suit in the issue was raised and subsequent suit.
14. Further the rationale for *res judicata* was enunciated in the case of *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR where the court pronounced itself as follows:

“The rationale behind *res-judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res-judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

15. The 1<sup>st</sup> defendant's case is that this case was finalized vide Kadhi's Succession Cause but further stated that the plaintiffs ‘applied for the reopening of the case which was done and the Kadhi gave orders touching on ownership of the suit land directing the land registrar to revoke and cancel a title and further comply with the report of the National Land Commission.



16. The 1<sup>st</sup> defendant also states that they challenged the Kadhi's orders which were set aside as the Kadhi did not have jurisdiction to grant such orders
17. It is surprising that the 1<sup>st</sup> defendant in the same breath states that the suit was heard and determined hence this case is *res judicata*. This suit does not meet the ingredients of *res judicata* as the matter was not heard and determined by a competent court and no final orders were granted resolving the case.
18. This case has many issues and facts which include fraud which the court cannot wish away by terminating prematurely vide a preliminary objection. What is it that the 1<sup>st</sup> defendant does not want the court to hear from the other parties.
19. I therefore find that this is a case that must proceed to full hearing unless the parties enter into a consent as it does not meet the ingredients of *res judicata*.
20. On the issue of whether the plaintiffs should furnish security of costs, order 26 rule 1, of the [Civil Procedure Rules](#), the court may order for security for costs where it is established that a party has no known assets in the country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bonafides of the plaintiff's claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account as was held in the case of [Jayesh Hasmukh Shab v Narin Haira & another](#) (2015) eKLR as follows:

“The principles on which a court exercises its discretion in an application for security of costs were considered in the case of *Keary Development v Tarmac Construction* (1995) 3 ALL ER 534 F Tuiyot, J in *Ocean View Beach Hotel Ltd v Salim Sultan Mollo & 5 Others* (2012) eKLR as follows:-

1. The court has a complete discretion, whether to order security, and accordingly it will act in the light of all the relevant circumstances.
2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.
3. The court must carry out a balancing exercise. On one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant If no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.
4. In considering all the circumstances, the court will have regard to the plaintiff's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.
5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount, it is not bound to make an order of a substantial amount.
6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.



7. The lateness of the application for security is a circumstance which can properly be taken into account.”
21. The 1<sup>st</sup> defendant has not given sufficient reasons why this court should order the plaintiffs to furnish security of costs. An order for security of costs is discretionary and the court should exercise the discretion judiciously and not unfairly stifle a valid claim.
22. The court must balance the scale of justice whereby on one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security and on the other hand weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff’s claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. This is where discretion comes in handy in resolution as to whether to grant or not to grant and order of security of costs.
23. I have considered both applications for security of costs and preliminary objection and find that both lack merit and are therefore dismissed with costs to the plaintiffs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 22<sup>ND</sup> DAY OF DECEMBER, 2022.**

**M A ODENY**

**JUDGE**

